Public Prosecutor v Perinbam a/l Thurai Singam

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–32 OF 2002
ABDUL KADIR MUSA J
13 APRIL 2006

Criminal Law — Dangerous Drugs Act 1952 — ss 12(2) & 39A(2) — Sentence

Criminal Procedure — Sentence — Possession of drugs — Use of statistics, guidelines — Mitigating factors

The first accused in the instant case was originally charged with drug trafficking with two others under s 39B of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code. However an alternative charge was brought against him for possession of dangerous drugs contrary to s 12(2) of the Act and punishable under s 39A(2) of the Act. The weight of the drugs was 428.1g. He pleaded guilty and was convicted. The prosecution pressed for a deterrent sentence whereas the defence presented several factors in mitigation.

Held, sentencing the first accused to seven years' imprisonment plus 10 strokes of the rotan:

(1) Statistics should not be blanketly accepted as the main consideration in passing sentence in all drugs related cases, rather statistics constitute a general guideline that should not be ignored. The end result would still have to be based on the facts of each case (see para 26).

(2) In imposing a term of seven years' imprisonment, the court would give appreciative consideration of the public interest and reconcile it with the following mitigating factors from the accused: (a) his tender age when committing the crime; (b) his guilty plea; (c) no previous convictions (see para 27).

[Bahasa Malaysia summary

Tertuduh pertama dalam kes semasa pada mulanya telah dituduh mengedar dadah bersama dua orang lain di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta tersebut') dibaca bersama s 34 Kanun Keseksaan. Bagaimanapun satu pertuduhan alternatif telah dibuat terhadapnya kerana pemilikan dadah berbahaya bertentangan dengan s 12(2) Akta tersebut dan boleh dijatuhkan hukuman di bawah s 39A(2) Akta tersebut. Berat dadah adalah 428.1g. Beliau mengaku bersalah dan telah disabitkan. Pihak pendakwa mendesak agar satu hukuman pencegahan diberikan manakala pihak pembela mengemukakan beberapa faktor peringanan.

Diputuskan, menjatuhkan hukuman tujuh tahun penjara dan 10 kali sebatan rotan ke atas tertuduh pertama:

(1) Statistik tidak boleh diterima sebagai pertimbangan utama dalam menjatuhkan hukuman dalam semua kes berkaitan dadah, bahkan statistik hanya membentuk panduan am yang patut diambilkira. Hasil akhirnya hendkalh berdasarkan fakta-fakta setiap kes (lihat perenggan 26).

(2) Dalam menjatuhkan hukuman penjara bagi tempoh tujuh tahun, mahkamah telah mempertimbangkan kepentingan awam dan menyelaraskannya dengan faktor-faktor peringanan berikut daripada tertuduh: (a) umur mudanya semasa melakukan kesalahan tersebut; (b) pengakuan bersalahnya; (c) tiada pertuduhan sebelumnya (lihat perenggan 27).]

Notes

For cases on possession of drugs, sentence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3662–3666.

For cases on ss 12(2) & 39A of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 151–152, 155, 222, 225–229.

Cases referred to

Loh Hock Seng & Anor v PP [1980] 2 MLJ 13 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256, (refd)
PP v Ooi Leng Swee & Ors [1981] 1 MLJ 247 (refd)
Rex v Kenneth John Ball 35 Cr App R 164 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 39A(2), 39B
Penal Code s 34

(Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
(Ramasamy & Co) for the accused.

Abdul Kadir Musa J:

[1] The first accused, Perinbam a/l Thurai Singam was originally, on 23 March 2004, jointly charged with Chandra Mohan a/l Muniandy ('the second accused') and Jagdish a/l Krishnan ('the third accused') under s 39B of the Dangerous Drugs Act 1952 read together with s 34 of the Penal Code, but the trial proper could only take place on the 26 March 2004. Due to unavoidable circumstances, several justifiable postponements had to be allowed; the last was 25 January 2006, which was postponed to 14 February 2006. During the trial proper and till 25 January 2006, the prosecution called eight witnesses, excluding three witnesses involved in a trial within a trial.

[2] It is perhaps proper for me at this juncture to point out that, I could detect several real doubts in favour of the defence but reserved them till the prosecution close their case. Since the court is not to participate in, but to adjudicate the trial, I must say here, with the greatest respect to the prosecution that, should those real

doubts still exist at that stage, I would not hesitate to acquit and discharge a1l the three accuseds without their respective defence being called. It was perhaps the learned DPP and or all the other parties concerned entertained such appreciation of such real doubts that, they requested the continued hearing on the 25 January 2006 to be adjourned to 27 January 2006 to enable them to take their final instruction(s) from their respective clients, which was again put to final postponement to 14 February 2006. It was only on the 14 February 2006 that the prosecution tendered an alternative charge against only the first accused under s 12(2) of the Dangerous Drugs Act 1952, punishable under s 39A(2) of the same Act which I marked it as P2A.

[3] P2A reads as follows:

PENDAKWA RAYA

LAWAN

PERINBAM A/L THURAI SINGAM

PERTUDUHAN PILIHAN

Kamu adalah dituduh atas arahan Pendakwa Raya dan pertubuhan terhadap kamu adalah seperti berikut:

Bahawa kamu pada 4 Mac 2002 jam lebih kurang 6.30 petang di kawasan belakang Wisma Indah, Jalan Nicholas, dalam Daerah Cheras, dalam Wilayah Persekutuan Kuala Lumpur, telah didapati dalam milikan kamu dadah berbahaya iaitu campuran Heroin dan Monoacetylmorphines seberat 428.1 gram (290.6 gram Heroin dan 137.5 gram Monoacetylmorphines) dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39A(2) Akta yang sama..

BERTARIKH pada 13 Februari 2006.

[4] P2A was read and explained to the first accused in simple language. He understood it and pleaded guilty to P2A. After ensuring that he understood fully the consequences of his such plea, I proceeded to ask the learned DPP for additional facts, if any. In that context, he tendered the additional facts as per P17.

[5] From P17, the first accused was positively identified by Chief Inspector Haslah bte Bachok (PW7) to be the first accused who, at the material time, was carrying the black plastic beg (P4(A)) (para 2 of P17) which was later found to contain 10 plastic packets (P4(B1-B10); para 4, ibid.) of incriminating drugs. P4(B1-B10) was later sent to the Chemist (PW5) for analysis whereby it was confirmed by him to be a mixture of 290.6g of heroin and 137.5g of monoacetylmorphines.

[6] The contents of P17 and the relevant parts of the evidence at the trial proper against the first accused were explained to him in simple language, to which he admitted to be true and correct and has no question to ask or clarify. On that admission, I accepted his plea to P2A and found him guilty of the same and asked his learned counsel to mitigate on his behalf.

[7] In mitigation, the court was informed that:

(1) the first accused had only up to SPM level of education;

(2) before his arrest in respect of this case (4 March 2002), he was working as a clerk with an income of RM750 a month;

(3) with the said income, he was able to contribute financially to his parents;

(4) his mother,a temporary cook at a restaurant in Sungai Buluh, Selangor, is now suffering with partial facial stroke, and needs his personal assistance while still being single;

(5) at the time of his arrest, he was about 19 years and 11 months of age and this is his first offence;

(6) since being in remand, he had learnt a bitter lesson, in that he was not able to attend the funerals of his own father and grandfather; and

(7) with the above, he was very determined to come back to the society as soon as possible as a changed person.

[8] The learned DPP, on the other hand, urged the court to pass a deterrent sentence of about 15 years imprisonment in view of:

(1) the quantity of the drugs involved;

(2) rampantness of such offences; and

(3) above all, the demand of public interest to pass such a sentence as suggested at (1) above.

[9] To support his contention, he submitted:

(1) the statistics of sentences imposed by both the Federal Court as well as the Court of Appeal; and

(2) Court of Appeal Case, vide Rayuan Jenayah NoW-05–77–99 dated 22 July 2004, for my consideration.

[10] I have studied the case cited as No (2) above ('No 2') and concluded that it cannot be used as a good comparison to the present case before me for, inter-alia, the reasons below.

[11] In 'No 2', the amount of heroin recovered was very much more than the case before me. In the former, it was 13,749.8g, whilst in the present case, the combined weight was only 428.1g. If I were to apply strict mathematical proportionality basis, then the first accused should get just a bare minimum of five years imprisonment and not seven years as imposed by me. If at all I can use as a guide, no matter how serious the courts viewed 'No 2', it still imposed the minimum 10 strokes of rotan as being a correct amount of whipping; and thus my imposition of 10 strokes of rotan for the present case must therefore be in line with that view.

[12] Secondly, in the aforesaid 'No 2', it was the court that amended the charge from s 39B to s 12(2) punishable under s 39A(2) of the Dangerous Drugs Act, 1952, but not in the present case; it was the prosecution who tendered the alternative charge (P2A) during the prosecution's case. Such tendering must have been, if I am permitted to infer, due to the 'real doubts' that I was referring earlier above.

[13] Thirdly, the drugs found in the said 'No 2', was hidden in the boot of the Car WCV 2088, whilst in the present case, it was found carried by the first accused in P4(A). There was certain evidence of the accused in the said case 'No 2' running away from the police but not so clear in the present case.

[14] Fourthly, and most striking difference is the fact that, in the said 'No 2', the accused right from the start of the trial was charged alone. In the present case, the first accused was jointly charged with two other accuseds aforesaid. Of the three accused persons, the prosecution deemed fit and proper to tender P 2A against only to the first accused and was prepared to have the other two acquitted and discharged of the charge under section 39B of the Dangerous Drugs Act, 1952; which was eventually done so by the court.

[15] On the premises above, the question of weight, though should be amongst the prime factor for me to consider in passing sentence in the present case, should not be the sole criterion to do so. If that can be accepted, the aforesaid 'statistics' should also be considered in the light manner, but not to be religiously followed by the court in all drugs related cases. Even, a close analysis of the said 'statistics' does not show consistency in passing sentence by different forum of the higher courts, as the case may be. Except in 1 cases, what is consistent in all other cases is the imposition of the strokes of rotan; that is, 10 strokes of rotan similar to what I have imposed in the present case.

[16] In submitting the said 'statistics', the learned DPP drew to my attention to case No 4, p 1. whereby the accused (was charged alone but in the present case, the Accused was charged with two others) was sentenced to 18 years and 10 strokes of rotan. The amount of drugs involved was 26.3g of heroin (in the present case 290.6g) and 130g monoacetylmorphin (in the present case 137.5g). The year is 2000 (in the present case, the offence was committed on 4 March 2002). The second case referred to by the learned DPP was No 2, p 3. The particulars of the said 'statistics' are as follows:

(i) Year of conviction: 27 July 2002.

(ii) Accused was charged alone.

(iii) Drugs involved:

(a) 11.8g of heroin; and

(b) 5.2g of monoacetylmorphin.

(iv) Sentence:

18 years imprisonment plus 10 strokes.

[17] The third case referred was No 3 p 3 of the said 'statistics'. The particulars are:

(i) Year of conviction: 18 June 2002;

(ii) Accused was charged alone:

(iii) Drugs involved:

(a) 18.4g of heroin; and

(b) 56.5g of monoacetylmorphin.

[18] From those three cases referred to by the learned DPP, no details of, inter alia.

(i) At what stage the accused in each case was found guilty of the offence charged?;

(ii) How was each of the accused persons found guilty?: Did all of them pleaded guilty on, presumably, the amended charges, (since no details are provided by the said 'statistics') introduced by the prosecution during the prosecution's case (a fact which would be similar to the present case) or by the court as in the aforesaid Appeal of W–05–77–99 (which certainly differ with the situational facts of the present case).

[19] Without such basic details, I find it difficult to be guided by the referred sentences of the aforesaid referred cases in the said 'statistics', without having first to critically analyzing the said 'statistics'. The elements of 'rampancy' (*Loh Hock Seng & Anor v Public Prosecutor* [1980] 2 MLJ 13, at p 14) or whether all of the accused persons in the 'statistics' were 'drug traffickers and or drug peddlers' (see *Public Prosecutor v Ooi Leng Swee & Ors* [1981] 1 MLJ 247, at p 248) could not be justifiably extracted from the said 'statistics' based solely on the aforesaid three referred cases by the prosecution, which can be construed as if I have ' … committed a grave error … ' (please see W–05–77–99, p 13, second last sentenced by not imposing an appropriate deterrent sentence for the reasons explained below.

(1) Going on the basis of 'frequency', the said 'statistics' under the headings of 'CITATION', and perhaps TARIKH PENGHAKIMAN. reveals:

(a) In 1995, there were four cases reported (ie at pp (1) & (2) of the said 'statistics');

(b) None in 1996:

(c) In 1997, only one case (at p (1), ibid.);

(d) In 1998, only one case (at p (1), ibid.);

(e) In 1999, only one case (at p 2, ibid.);

(f) In 2000, were eight cases (at pp (1) & (2), ibid.);

(g) In 2001, none;

(h) In 2002, there were nine cases (at p 3, ibid.);

(i) In 2003, none;

(j) In 2004, there were eight cases (at pp 4, 5 & 6, ibid);

(k) In 2005 there were 12 cases (at pp 6–8, ibid.);

[20] From the above, if the said 'statistics' shows a 'true representation' of 'frequency', items (a)–(e). (g) & (i) above, do not support such proposition; more so if we based on (c).(d) and (e). On the contrary, taking item (a) as a comparative platform against items (b)–(e), it clearly shows a decline instead of an increase. Similar result is being conveyed when item (h) is compared against items (i) or (g). The increase is apparently demonstrated when item (e) is used as a base to compare with items (f).(h).(j) and (k). However, it would be impossible for me to accept that there was no drug related activities at all in 1996 (item (b)),. 2001 (item (g) and 2003 (item (i)). Without being speculative, the only logical explanation to it would be that, there were more than one case dealt with by court in 1997, 1998 and 1999, but not reported or statistically recorded; the same is also true in 1996, 2001, and 2003.

[21] The reasonable explanation to explain that situation as a whole is that, out of the cumulative number of cases at the end of 2001, only nine cases were dealt with in 2002; similarly situations as pointed in items (j) and (k) of the said 'statistics'. As such, if that can be accepted, then the respective sentences should only be a general guideline and not to be the core consideration in passing in every case, which is the general, accepted principle of sentencing to which I fully adhered to in respect of the case before me.

[22] If the sentences imposed in relation to the year and weight of the drugs involved are to be the basis of consideration, the said 'statistics' could not also form a good justifiable yardstick of sentences for the future drug related cases. I will attempt to show it by taking a few examples.

(A) *Re item (a) (in 1995) itself*

Two cases involving different weights of heroin were statistically recorded and they are (i) case No (6), p 1 and (ii) case No (14), p 2 of the 'statistics' whereby in both, the sentence was life imprisonment. In (i), the weight was 2,840.3g of heroin whilst in (ii) the weight of heroin was only 46.4g.

In case No (3), p 1, the weight involved was 25.84g of heroin and the sentence of imprisonment was 14 years, wherelse in case No (15), p 2 of the 'statistics', the sentence of imprisonment was 12 years where the weight of heroin involved was 44.15g which was clearly more than that in the said case No (3).

(B) *Re items (e) (1990) and (f) (2000)*

In case No (13), p (2), the weight involved was 5.95g (heroin) and the sentence was five years imprisonment and 10 strokes, while in case No (11), the weight of the mixture of drugs involved was 6.1g and the sentence of imprisonment was also five years (and 12 strokes). If the year js to be the criterion, then the imprisonment term in respect of the said case No (11) should be longer than in the said case No (14).

(C) *Re item (h) (2002)*

There are two types:

(i) Pure heroin; and

(ii) Mixture of heroin and monoacetylmorphine.

In the case of (i), there is some foundation jn the case of cases No (8) and (9) at p 3 where sentences in case No (8) (18 years imprisonment) is higher than case No (9) (16 years imprisonment) in respect of both the weight of heroin and the date of the respective sentences. However, this is not true when case No (8) is compared to case No (6) at p (3). In the latter case No (6), the date of sentence was 18 March 2002. the weight of heroin involved was 90.93g (heavier than in case No (8):the weight was 48.3g) and the sentence was 15 years imprisonment plus 10 strokes.

(D) *Re case No: (2) item (j) at page 5 competed with some other relevant cases in other items of the statistics*

In the said case 'No (2)', the amount of heroin involved was 1,689.68g, a weight of more than those found in cases No (2) (p 4), (8) (p 3), (5) (p 3), (1) (p 3), (14) (p 2) and (1) (p 1). yet the sentence imposed by the court in 2004 was 16 years and 10 strokes.

(E) Even taking the very three cases referred to by the learned DPP, there is still no consistency in sentencing as he would like me to accept his contention but unable to convince me to do so, and that is, because of what I strongly conclude as to how various courts at different times for different circumstances of the cases imposed different sentences as reflected by the said 'statistics'. 'Why?' such a conclusion.

[23] Based on those said three referred cases, it was certainly clear that they all differ from the present case before me in that:

(i) In each of those three said cases, the accused was charged alone and not in the present case; and

(ii) No indication whether each of the relevant accused pleaded guilty at the very beginning of or later part of the initial trial or found guilty by the appellate court on amended charge from the original charge of s 39B of the Dangerous Drugs Act 1952; a situation entirely different from the present case.

[24] From those said three referred cases, the relevant particulars for present analysis are:

No	Case No	Weight of Drugs Involved	Sentence and Date
(1)	(4), pg (1)	(i) 26.3g heroin + (ii) 130g Monoacetyl-morphine Total = 156.3g	18 years imprisonment plus 10 strokes Ref [2002] 1 MLJ 687
(2)	(3), pg (3)	(i) 18.4g heroin + (ii) 56.5g Monoacetyl-morphine Total = 74.9g	15 years imprisonment plus 10 strokes 18/6/2002

(3) (2), pg (3)	(i) 11.8g Heroin + (ii) 5.2g Monoacetyl-morphine Total = 17.0g	18 years imprisonment plus 10 strokes 22/7/2002

are statistics from Court of Appeal. From it, if No: (1) is compared with No (3), there is some justification to conclude that, regardless of the weight of the mixtures of the drugs involved, the trend was toward imposing deterrent sentences: that is, in No (1) vide [2000] 1 MLJ 687, the weight of the mixture was 156.3g whilst in No (3). It was only 17g..

[25] However, the above cannot be said to be true if the weight of the mixture and the year in relation to the sentence in any of those three referred cases is compared with case at p (6) of the 'statistics'. The highest in example (E) is in case No (4) at p (1) where the weight involved was 156.3g in 2000 and the sentence was 18 years of imprisonment plus 10 strokes of whipping wherelse in the aforesaid case No (5) which is in February 2005. the sentence imposed by the Court of Appeal was 15 years of imprisonment plus 10 strokes of whipping for a total weight of mixture of 185.37g (ie 149.6g heroin + 35.77g monoacetylmorphine).

[26] From all the above illustrations, I am fully supported of the fact that, the said 'statistics' should not be blanketly accepted as one of the main considerations in passing sentence in all drugs related cases as contended by and if I understood the learned DPP right, but just a general guideline that should not be ignored. The end result will still have to be based on the facts of each case which, to borrow Hashim Yeop A Sani J (as he then was) words in the case of *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, at p 257, (F) right, '… must be realistic and rational.'

[27] Having noted and fully entertained above appreciatively, in imposing the seven years imprisonment term, I gave appreciative consideration of public interest and reconciled it with the relevant mitigating factors from the Accused. Amongst them, was his 'tender age' when he committed this offence. Such 'tender age' has the general characteristics of being 'volatile and fluid' to the influence of the environment of his then acquaintances' exposure as evidenced by the fact that he was originally charged with two others. Secondly, in my considered opinion, an acceptable evidence of his 'probable genuine intention' of repentance was his coming to terms of pleading guilty to. P2A in spite of the fact that, as pointed out earlier, he could be acquittal of P2 as in the case of the other two accuseds at the end of the prosecution's case. Such an act justifiably convinced me that, the accused was not only prepared to take the whole blame upon himself, but also save the court's time and public expenses by not going through the process of a full prosecution's case; a positive credit to be given to the accused. There was no previous conviction against the accused.

[28] With all the above 'pluses' in favour of the accused, I am persuaded by the circumstances of this case, to adopt what was said and, more often than not, quoted by Hibery J in *Rex v Kenneth John Ball* 35 Cr App R 164, as follows.

A In deciding the *appropriate sentence* a *court should always be guided by certain considerations* [but *not* to blanketly *overemphasized by* the *'statistics'* as persuaded by the Prosecution in this case]. The first and foremost is the *public interest* … A proper sentence, passed in public, serves the public interest in *two* ways …. [One of the ways is to] … induce him to turn *from* a criminal to an honest life. *The Public interest is served, and best served,* if the offender is induced to turn *from* criminal ways to an honest living. *[Thus, it is for] … the court to decide* B *what is, within the maximum, the appropriate sentence for* each criminal in a particular circumstance of each case. *Not only in regard to each crime, but* in regard *to* each criminal, the court has the right and duty whether to be lenient or severe. (Emphasis added.)

[29] From the above quotation (with modifications) it speaks of:

C (1) 'Public interest';

(2) 'How' such interest be served;

(3) In relation to (1) and (2), 'what' would be the 'appropriate sentence';

(4) In passing such 'appropriate sentence' the court should not only take into D consideration to each crime, but also to each criminal; and

(5) Such 'appropriate sentence' must be within the maximum sentence allowed in law.

[30] E Thus guided by the said (1)–(5) and discussion above, my sentence of seven years imprisonment plus 10 strokes of whipping' is certainly 'within the [permitted] maximum' ((5) above). In considering an 'appropriate sentence' ((3) above), I have not loss sight of 'each crime' and 'each criminal' ((4) above) in that 'public interest' (1) above), is best served ((2) above), having regards to all the circumstances of all the relevant facts in the present case, and having full belief that such a sentence would F have a high chance of 'induc[ing the accused] to turn from criminal ways to an honest living' for the reasons stated by me earlier above. On that note, I have carefully considered and ultimately decided to lean on leniency rather than otherwise; thus my aforesaid sentence.

G *First accused sentenced to seven years' imprisonment and 10 strokes of rotan.*

Reported by John Paul Simon

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